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Supreme Court of the United States

OCTOBER TERM, 1975

74-858
74-859

HUGH L. CAREY, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, SIDNEY A. FINE, Justice of the Supreme Court of the State of New York, First Judicial District and GEORGE BEISHEIM, JR., Justice of the Supreme Court of the State of New York, Ninth Judicial District,

Appellants, (74-858)

and

CURTIS CIRCULATION COMPANY, CONTINENTAL COMPANY,

Appellants, (74-859)

against

BERT RANDOLPH SUGAR and WRESTLING REVUE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS CAREY, FINE, BEISHEIM AND ATTORNEY GENERAL *PRO SE*

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants Carey, Fine, Beisheim and pro se and also pursuant to New York Executive Law § 71
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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BRIEF FOR APPELLANTS CAREY, FINE, BEISHEIM AND ATTORNEY GENERAL *PRO SE*

Opinions Below

1. Opinion of the District Court, convening three-judge court. 377 F. Supp. 1055, June 17, 1974 (J.S. 19a).*

2. Opinion of three-judge District Court declaring New York Civil Practice Law and Rules 6201(4), (5) and (8) unconstitutional. 383 F. Supp. 643, October 17, 1974 (J.S. 1a).

3. Probable jurisdiction noted. —— U.S. ——, 43 L. Ed. 2d 773, April 14, 1975.

Jurisdiction

Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253. The judgment appealed from was entered November 6, 1974 (J.S. 31a). Notices of Appeal were filed on November 27 and 29, 1974 (J.S. 33a, 35a). Probable jurisdiction was noted April 14, 1975, Opinion Below.

Questions Presented

1. Does New York Civil Practice Law and Rules, Article 62, 6201 *et seq.*, violate any due process requirements of the Fourteenth Amendment to the United States Constitution in the procedure provided for the issuance of judicially supervised orders of attachment?

2. Is there a lack of a meaningful opportunity to vacate orders of attachment in New York?

(a) Is the "burden of proof" really on appellees in moving to vacate, and is such a burden the dispositive due process consideration on such motions?

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* Numbers in parentheses refer to Appendix (a) or Appendix to Jurisdictional Statement (J.S. a).

3. Is the existence of a vendor's lien or possessory interest crucial to the constitutionality of an attachment statute?

Statute Involved

New York Civil Practice Law and Rules (CPLR), Article 62 (6201 *et seq.*) (Attachment) (reproduced in full at J.S. 37a-49a).

The specific portions of Article 62 set out in Appendix A to this Brief are: CPLR 6201, subd. (4), (5) and (8) but including all of 6201; 6211, 6212, 6222, and 6223.

Statement of the Case

The instant action was instituted to challenge the constitutionality of an attachment granted by a New York state court on the grounds specified in New York Civil Practice Law and Rules (CPLR) 6201(4), (5) and (8). The plaintiffs-appellees claim that such an attachment of their property granted *ex parte* violates their Fourteenth Amendment rights to due process. Federal jurisdiction was alleged under 28 U.S.C. §§ 1331(a) and 1343(3) and (4).

In August, 1971, Champion Sports Publishing Inc. ("Champion") through appellee Bert Sugar entered into a written agreement with appellant Curtis Circulation Company ("Curtis") (42a). It provided that Curtis would distribute magazines for Sugar and Champion. Under the agreement, Curtis was to and did make advances to Champion which, by virtue of the contract, Curtis was entitled to recoup from moneys received by Champion as a consequence of the distribution of the latter's magazines (55a-56a). The agreement was to run five years.

In accordance with the agreement Curtis advanced between August, 1971 and December, 1972 over $100,000 to

Champion (42a). According to the affidavit of Stuart J. Friedman, in support of the application for the order of the attachment in the State Supreme Court (42a-44a) it was believed that Sugar caused Champion and appellee Wrestling Revue to enter into an operation to defraud Curtis of its rights as a creditor. Six of the publications subject to the agreement were transferred by Champion to Wrestling for no consideraiton in November, 1972. Wrestling thereupon sold the publications to an independent third party for a consideration, none of which was paid to Champion (43a). There was a licensing agreement, which was either a fraud or contrivance to avoid the agreement between Champion and Curtis (44a). Curtis stated the basis of the above allegations as information obtained in meetings between the attorneys for the third party, National Sports and Curtis on March 2, 1973 (44a). After the several assignments Champion had no assets (45a). Thus Champion had received large sums of money from appellant Curtis, but stripped itself of assets so as to be unable to repay (46a, 50a). As of February 28, 1973, Curtis had advanced payments of $28,588.08 which had not been recouped. It sought the attachment for that amount (45a).

Curtis knew nothing of the alleged ownership of the publications by Wrestling. It thought they were Champion's. This was alleged to be fraud (52a). The complaint, stating several causes of action in fraud and breach of contract was annexed to the moving papers for the order of attachment (47a-54a).

Having learned all this, Curtis notified National Sports to withhold payment (36a). National did so (16a, 37a). Wrestling sued National, March 5, 1973 (16a, 36a-37a). Then Curtis sued Sugar, Wrestling and Champion, April 13, 1973 (16a). Curtis also obtained the order(s) of attachment, the subject matter of the federal action and the instant appeal (39a-41a), pursuant to grounds found in

CPLR 6201(4), (5) and (8). This, of course, was *ex parte* and by order of a Justice of the Supreme Court of the State of New York Sidney A. Fine, one of the appellants herein.

The application was grounded on three alternative grounds all involving elements of fraud and deceit. One ground was based on CPLR 6201, subparagraph (4):

> "the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts."

to wit:

> (a) "Champion Sports has assigned disposed of or removed property from the State of New York with intent to defraud its creditors".

The second ground was based on Subparagraph (5):

> "the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability".

to wit:

> (b) "Champion Sports and Sugar, its principal officer, have been guilty of a fraud in contracting or incurring a liability upon an express contract" and

The third ground was based on Subparagraph (8):

> "there is a cause of action to recover damages for the conversion of a personal property, or for fraud or deceit".

to wit:

> (c) "Champion Sports, Sugar and Wrestling Revue are liable to Curtis for damages in a cause of action for fraud and deceit".

It was supported by the affidavit of Stuart J. Friedman, (Corporate Secretary of Curtis) (41a-46a), a complaint (47a-54a), a copy of the contract (55a-57a), and a financial work sheet (58a) (§ 6212[a]). Also a bond of $10,000 was posted (§ 6212[b]). This was in an amount set by the State court to cover damages in the event of wrongful attachment (§6212[b]).

Rather than moving under § 6223 to vacate the attachment the state court defendants (Sugar and Wrestling Revue) instituted the instant action in federal court to, in effect, review the action of the state court in granting the attachment.*

Prior Proceedings

Upon filing the complaint in federal court, the plaintiffs-appellees applied for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284. The appellants Curtis and Continental opposed and moved to dismiss. The single judge District Court, despite the holding of *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974) and recognizing the numerous similarities between the New York law and the Louisiana statute upheld in *Mitchell*, denied the motion to dismiss and convened a three-judge court (J.S. 15a, 377 F. Supp. 1055). In passing, the single judge (LASKER, D.J.) rejected claims that the money which had been attached was being withheld anyway (J.S. 17a-19a) so as to avoid the constitutional claim and that the federal court should defer to the state court which had issued the attachment, where there was an action pending and could decide the issues (J.S. 19a-22a). After recognizing the similarities, the convening decision saw the creditor in *Mitchell* as having a (1) possessory interest and vendor's lien in the property

* The pendency of the state court action and the obvious multiplicity of suits, raises a serious issue as to whether comity and federalism required dismissal of the federal action. *Huffman* v. *Pursue, Ltd.*, —— U.S. ——, 43 L. Ed. 2d 482 (Mar. 18, 1975).

attached and (2) the proof of the above could readily be established on documentary proof. Judge Lasker did not see the challenged New York provisions as capable of such simple proof (J.S. 29a).

Upon presentation to the three-judge court, Judge Lasker again wrote the opinion and struck down the New York attachment statute. Continuing the point-by-point comparison to the Louisiana statute upheld in *Mitchell, supra,* the opinion stated that CPLR 6223 ("vacating or modifying attachment") is the sole mechanism available to the defendant to vacate an attachment and it did not meet the standards of *Mitchell,* Art. 3506, Louisiana Code of Civil Procedure (La. C.C.P.) (J.S. 8a). It held that the sole basis of vacating an attachment in New York under the CPLR was that the attachment "is unnecessary to the security of the plaintiff", and the burden is on the defendant moving to vacate, not the plaintiff, as in *Mitchell* (J.S. 9a).

Furthermore, it was asserted that appellant Curtis never had a legally cognizable, concurrent possessory interest in the property attached. It only had a claim of fraud (J.S. 10a).* The question of fraud was seen as "ill-suited" for preliminary *ex parte* determination.

In summary, *Mitchell* was seen as a narrow exception to the "general rule" of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and the statute, CPLR 6201 (4), (5) and (8), was invalidated by the general *Fuentes* rule.

However, the CPLR was found unconstitutional only to the extent "a New York defendant has no meaningful opportunity to vacate an order of attachment . . ." (J.S. 12a).

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* Curtis may very well have had a lien on the moneys attached, as it had advanced them to Champion under a contract. This could be said to be an equitable lien created by implication. 35 N.Y. Jur., *Liens,* § 15.

The holding, as being based on the asserted lack of a meaningful opportunity to vacate the attachment, was confirmed by the signing of a judgment enjoining enforcement of CPLR Article 62, 6201(4), (5) and (8) "until and unless a meaning opportunity to vacate an attachment is provided . . ." (J.S. 32a). The Sheriff was ordered to release the attachment. However, the judgment was stayed on condition the defendants file a notice of appeal to the Supreme Court (32a).

The defendants, all except the Sheriff, who never appeared, did appeal (J.S. 33a, 35a) and this Court noted probable jurisdiction on April 14, 1975 —— U.S. ——, 43 L. Ed. 2d 773.

The Background of Attachment

The provisional remedy of attachment is found in the Civil Practice Law and Rules, Article 62, which itself was a simplification and modification of the former Civil Practice Law, §§ 902-973. Attachment can be used to perform two separate functions, although both can be found in certain cases. One is to establish a jurisdictional basis which allows the court to act when personal jurisdiction cannot be obtained. The second is to provide the plaintiff with security for the satisfaction of any judgment he might obtain in the action. An attachment order allows the Sheriff to levy on defendant's property. CPLR 6211.

The instant action is concerned with attachment for security purposes, the second example above. Such an attachment preserves a *res* out of which to satisfy a judgment should plaintiff prevail because it seems likely he will have difficulty enforcing his judgment. See generally 7A Weinstein-Korn-Miller, *New York Civil Practice*, ¶ 6201.01 *et seq.*

In New York, attachment is statutory in origin. *Penoyar* v. *Kelsey*, 150 N.Y. 77, 44 N.E. 788 (1896). It is issued

only by a judge, in strict compliance with the law, *Penoyar, supra.* Even then the judge must exercise discretion. Indeed the word "may" in the first paragraph of CPLR 6201 makes it clear the judge must exercise discretion. Attachment never is granted as of right. If the attachment serves none of the two purposes specified above, it is vacated. *Elliott* v. *Great Atlantic & Pacific Tea Co.,* 11 Misc 2d 133, 171 N.Y.S. 2d 217 (N.Y. City Ct., 1957), affd. 11 Misc 2d 136, 179 N.Y.S. 2d 127 (App. T., 1st Dept. 1958).

Summary of Argument

I. The District Court, in declaring New York's attachment statute unconstitutional, proceeded on several fallacious assumptions, which ultimately led to an erroneous result. Under CPLR 6223, attachment may be vacated on several grounds, including that the attachment is unauthorized in the action or that the grounds for attachment are insufficient. The District Court's contention that the only grounds to vacate are that the attachment "is unnecessary to the security of the plaintiff" is not correct and rebutted by numerous decisions in New York.

The issues on the motion to vacate (CPLR 6223) are as broad as in Louisiana in the statute approved in *Mitchell* v. *W. T. Grant Co.* (La. C.C.P. 3506). In neither case are the ultimate merits of the action inquired into. In both cases, the grounds for sequestration or attachment are tested with the burden on the plaintiff to justify the initial grant of the writ.

The plaintiff must show "facts" to justify the issuance of the writ and if they are contested by defendant (burden of going forward) justify his grounds further (the burden of proof). In any event, the issue of where the burden is placed on a motion to vacate is not of constitutional significance. Due process is a flexible concept which is well served by the New York statute.

II. It is not proper to confine the writ of attachment to instances where the plaintiff holds a pre-existing property interest lien in the property attached. There is absolutely no support for the curious notion of the District Court that the remedy of attachment must constitutionally be confined to those having such a pre-existing property interest. Historically the attachment procedure has been available in both state and federal courts to plaintiffs without regard to such pre-existing property interest, conserving of property to satisfy a judgment in the subsections of New York's statute at issue, § 6201 (and the others) is a sufficient basis, and overcomes any debtor interest in immediate access to property. Protection against fraud is an important state interest. Inquiry into "intent" is highly protective of debtors, and more so than in Louisiana.

This Court's decision in *Di-Chem* does not afford support to this notion since this Court did not mention the lack of a vendor's lien as a defect in the Georgia garnishment statute. The District Court failed to consider that grounds for attachment must be viewed within the flexibility due process undoubtedly possesses.

POINT I

There is no basis under *Mitchell* and *Di-Chem* to constitutionality challenge the State's commercial protective procedure of attachment upon due process grounds. On the contrary the statute affords a defendant ample basis for challenge and requires a judge to be satisfied that a *prima facie* showing of merit has been made by a plaintiff.

As has been noted by this Court, the constitutional validity of pre-judgment provisional attachment or garnishment remedies, granted *ex parte,* has been a continuing matter of concern. For the fourth time in less than four years, the due process aspects of a long-accepted provisional remedy is brought up for plenary consideration. See *North*

Georgia Finishing, Inc. v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d 751, 95 S. Ct. 719 (1975), dissent of BLACKMUN, J., 42 L. Ed. 2d at 761. The instant appeal present the substantial question of the adequacy of a statutory provision for vacating or modifying attachment granted initially *ex parte* by a judicial officer who must be satisfied that procedural requirements and adequate merit has been presented to him.

There is no doubt that primarily, or perhaps exclusively (in view of the judgment signed below), the three-judge District Court declared CPLR 6201(4), (5) and (8) unconstitutional, not because of any constitutional due process flaw in the initial granting of attachments. Rather the attachment granted was deemed unconstitutional because of the alleged inadequacy of the *vacatur* machinery. CPLR 6223.

A. The District Court Erroneously Limited the Basis for Vacatur to "Unnecessary Security".

Here unconstitutionality was not premised on what Section 6223 said but rather on what it did not say. Based upon its reading of New York decisional law, the three-judge District Court concluded that the sole basis for vacating an attachment is (1) "not that the grounds . . . are unproven, but the attachment 'is unnecessary to the security of the plaintiff' " and (2) the burden of proof is on the defendant moving to vacate (J.S. 9a).

Both propositions contain basic fundamental errors as to the State of New York law, even assuming *arguendo*, that the points are of constitutional significance in light of *Mitchell* and *Di-Chem*. These errors of the District Court in reading state law have been pointed out in several state court decisions rendered since the opinion under review. None have accepted the three-judge court's conclusion that there is no meaningful opportunity to vacate an attachment via Section 6223. This is so as these state cases demon-

strate that the "necessity" of the attachment is not the sole grounds for vacating an attachment in New York.*

Thus in *Regnell* v. *Page,* New York Law Journal (N.Y.L.J.) May 23, 1975, p. 14, c. 2 (Sup. Ct., N.Y. Co. FEIN, J.) (reproduced in full as an appendix to this brief) the state court noted the reliance of the *Sugar* court on the "unnecessary to the security of plaintiff" ground (CPLR 6223) as the sole basis for vacating an attachment. In reply, it said:

> "Such an interpretation, however, misconstrues the statute. A motion to vacate under CPLR 6223 on the ground that the attachment is unnecessary to the security of the plaintiff is but one of several available bases. Vacatur may be premised on the grounds among others, that the attachment is unauthorized in the action, or that the ground for attachment relied upon is insufficient".

If the facts are challenged on defendant's motion to vacate, an appropriate hearing can be ordered *Regnell* v. *Page,* N.Y.L.J. July 9, 1975, p. 11, c. 7, at c. 8, and *Regnell, supra.*

Authoritative on this point of availability of several and additional grounds is also *Maitrejean* v. *Levon Properties,* 45 A D 2d 1020, 358 N.Y.S. 2d 203 (2d Dept. 1974). There the plaintiff obtained an attachment, in part pursuant to CPLR 6201(4), removing property (or about to) with intent to defraud creditors, one of the subsections at issue. On appeal, it was said:

> "As respects defendant Levon, plaintiffs have failed to establish any intent to defraud creditors. Such in-

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* The decision (J.S. 8a), calls section 6223 the "sole mechanism available to a defendant who seeks to vacate the attachment". This, in a sense, is erroneous as CPLR 6222 permits discharge of the attachment by posting a bond. Vacatur (6223) or discharge (6222) have the same ultimate purpose—i.e., ending the attachment.

> tent may not be presumed from the mere disposition or removal of property (*Eaton Factors Co.* v. *Double Eagle Corp.*, 17 A D 2d 135)."

Or as propounded in *Macmillan, Inc.* v. *Hafner*, 42 A D 2d 533, 344 N.Y.S. 2d 729 (1st Dept. 1973), where an appeal also was taken on denial of a motion to vacate an attachment:

> "At best, respondent presented but a scintilla of proof as to the requisite elements of the fraud cause of action alleged in the complaint. Such a perfunctory showing falls short of the requirements to support the drastic remedy of attachment".

Another decision vacating an attachment, apparently granted under section 6201(8), according to the opinion* is *Richman* v. *Richman*, 41 A D 2d 993, 344 N.Y.S. 2d 52 (3rd Dept. 1973), where that state appellate court said:

> "The warrant [attachment] was issued 'for the wrongful and unlawful conversion of personal property and/or for fraud or deceit; and is an action upon a contract or stipulation wherein defendant has been and is, guilty of fraud and deceit in contracting and incurring said liability.' The only affidavit in support thereof, while using the conclusory words 'false and fraudulent', fails to set forth facts to sustain such allegations and the affidavit, when read in its entirety, at best, spells out an action for specific performance due to a breach of (stipulation) contract. * * * The present record is totally insufficient to sustain the issuance of the writ . . ."

See also *Martin Enterprises, Inc.* v. *M. S. Kaplan Co.*, 45 A D 2d 883, 358 N.Y.S. 2d 160 (2d Dept. 1974), where it

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* However we read it as also grounded in section 6201(5), although the papers did not designate under what subdivision of section 6201 the proceeding was commnced.

was said in vacating an attachment:

> "The affidavits, complaint and exhibits establish nothing more than that appellant held a controlling number of shares in the corporation with which plaintiff contracted. *There is not the least bit of evidence to establish the commission of the intentional torts pleaded.*" (Emphasis supplied)

Attachment may fail due to *forum non conveniens*, as another example. *Sutton* v. *Garcia*, 80 Misc 2d 690, 363 N.Y.S. 2d 695 (Sup. Ct., N.Y. Co. 1974). On wrong forum, *Gaskin* v. *Stumm Handel GmbH*, 390 F. Supp. 361, 363 (S.D.N.Y. 1975).

In fact the District Court's citation of cases (J.S. 9a) on "the sole basis" or burden of proof rests on non-resident defendant attachment decisions, *Hydromar Corp. of Delaware* v. *Construction Aggregates Corp.*, 32 A D 2d 749, 300 N.Y.S. 2d 797 (1st Dept. 1969); *George A. Fuller Co.* v. *Vitro Corp. of America*, 26 A D 2d 916, 274 N.Y.S. 2d 600 (1st Dept. 1966).* In these cases the "necessary to security of plaintiff" grounds is a matter that lies peculiarly within the defendant's knowledge. *Cf. Maitrejean, supra*, as to assets of foreign corporation.

Another experienced state court judge in *New York Auction Co.* v. *Belt*, N.Y.L.J. April 9, 1975, p. 17, c. 3 (Sup. Ct. N.Y. Co., *Silverman*, J.), also stated that *Sugar* had misinterpreted New York law:

> "Furthermore, the Sugar case seems to have proceeded on the assumption that an attachment may only be vacated in New York on a showing that it is not necessary for security purposes, and not because the plaintiff is unable to prove the grounds on which the

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* There is language in *Freedman* v. *Wilson Securities Corp.*, 31 A D 2d 627, 295 N.Y.S. 2d 789 (1st Dept. 1964), that the "unnecessary" clause can apply to all attachments.

attachment was issued, as the Mitchell case seems to require. In this respect, I think the court in the Sugar case misinterpreted the laws of the State of New York. It is an established practice in this State to vacate attachment not only where the attachment is unnecessary for security purposes, but also where it appears either that the plaintiff does not have a meritorious case or that the defendant is not a nonresident or foreign corporation. (cits. omitted).

"The court in the *Sugar* case relied upon the following sentence in CPLR 6223: 'If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment'. Apparently, the court in the *Sugar* case thought that was the only ground for vacating an attachment. But, the legislative history makes clear that this is merely an additional ground added to the existing ground for vacating an attachment in situations where an attachment initially used to obtain jurisdiction is no longer necessary for that purpose. See Third Preliminary Report, Leg. Doc. No. 17, p. 358 (1959); cf. McKinney's Supplementary Commentary (1964) to sec. 6223 at Supp. p. 47; *Data Realty Inc.* v. *Sciacca* (App. Term 2d Dept.) NYLJ, p. 22, col. 5 (May 18, 1970). It is the first sentence of CPLR sec. 6223 which is the successor to sections 948 and 949 of the Civil Practice Act (Sixth Report) on the Revision of the Civil Practice Act, Leg. Doc. No. 8, p. 591 (1962), and like those sections, seems to provide the defendant with a right to move to vacate the attachment on the ground that it is not authorized by the statute, including because the plaintiff is unable to prove that the defendant is a nonresident or foreign corporation." (cits. omitted).

B. Contrary to the District Court, the state law does provide a meaningful opportunity to vacate.

The District Court in its opinion below dwells at great length on the notion that a motion under § 6223 does not go to the ultimate merits (J.S. 9a-10a) and therefore concludes that the motion to vacate does not provide a "meaningful opportunity" to defendant. This ignores the fact that attachment is a "provisional remedy" which is not granted because the plaintiff is bound to prevail on the merits, but rather because there is a demonstrated need to preserve assets pending the conclusion of the action. Indeed, the plaintiff who obtains an attachment (CPLR Art. 62), does not receive possession of defendant's property but the attached property remains in possession of the sheriff. The District Court ignored or overlooked the important fact that the plaintiff must present "prima facie the existence of a cause of action" and "(t)he essential elements of the cause of action must be supported by evidential proof." *Aerotrade, Inc.* v. *Banque Nationale De La Republique D'Haiti*, 376 F. Supp. 1286, 1287 (S.D. N.Y. 1974).

The same type of hearing, on the grounds for attachment, is given under Louisiana C.C.P. Section 3506. The trial of the merits of the action is not involved under the Louisiana statute (and *Mitchell*) and equally so in New York under CPLR § 6223. See *Tucker & Schonekas* v. *Al Dohmann Chevolet, Inc.* (La. App.), 260 So. 2d 99, 100-101 (1972):

> "Official Revision Comment (c) under Article 3506 states that only the grounds for the auxiliary remedy, i.e., dissolution of the writ and damages for wrongful sequestration may be inquired into on the motion to dissolve and not the merits of the main demand".

Thus, both in Louisiana as approved in *Mitchell*, and New York, under CPLR 6223, a defendant may not present defenses to the complaint to vacate the attachment

but can only contest the adequacy of plaintiff's proof for granting attachment. Furthermore such a limitation on issues to be litigated at a preliminary stage does not make the procedure unconstitutional. See *Lindsey* v. *Normet*, 405 U.S. 56, 64 (1972), cited in *Mitchell* at 607, where this Court held it was "unable to conclude that . . . limitation on litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment". See also, 88 Harvard Law Review 71, *The Supreme Court, 1973 Term*, 76, n. 35.

C. Burden of proof is on the plaintiff. It is the burden of going forward that is on a defendant.

The hearing provided in New York (§ 6223) is as broad as the hearing in Louisiana. The only rational distinction is in the fact that the "burden of proof" is stated in Louisiana as on the plaintiff when a motion to vacate is presented (C.C.P. 3506) while in New York the defendant, who makes the motion is, commonly said to have the burden, although not so stated in the statute. See generally Weinstein-Korn-Miller, 7A *New York Civil Practice* ¶ 6223.05. However this statement of where the burden lies is a simplification, which is of form, not substance. See, *infra*.

In actuality the burden of proof to show entitlement to attachment rests on the plaintiff-moving party. This includes showing of a *prima facie* case. This is verified by numerous New York decisions.

As cited in *Regnell, Stines* v. *Hertz Corp.*, 22 A D 2d 823, 254 N.Y.S. 2d 903 (2d Dept. 1964), affd. 16 N Y 2d 605, 261 N.Y.S. 2d 59 (1965) states:

> "While the court is not required to decide the merits of a controversy on a motion to vacate an attachment 'the attachment papers must contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated (*Krellberg* v. *Gregory*, 10 A D 2d 824), where the complaint

> and affidavits fail to establish a prima facie cause of action, or where they clearly establish that the plaintiff must ultimately be defeated', the attachment must be vacated (*American Reserve Ins. Co.* v. *China Ins. Co.*, 297 N.Y. 322, 325)."

See also *Macmillan, Inc.* v. *Hafner, supra.* 42 A D 2d 533, 344 N.Y.S. 2d 729.

In New York, the party seeking the attachment has to carry a significant burden of proof in order to convince a judge to exercise his *discretion* and grant an *ex parte* order. The litigant *"shall show"* (6212[a]) that he has a cause of action and grounds for attachment exist. This is fundamental. This is not a mere formality. This was pointed out by District Judge Weinfeld in the *Aerotrade* case, *supra,* where he pointed out that the federal court follows the state procedure on attachment and insists upon this showing of merits by plaintiff (see also, 376 F.Supp. at 1288): "Upon the record presented there is sufficient doubt that plaintiffs have *prima facie* established their claims as to warrant denial in the exercise of the court's discretion of the motion for the issuance of a warrant of attachment"). As to grounds, see *Eaton Factors Co., Inc.* v. *Double Eagle Corp.*, 17 A D 2d 135, 232 N.Y.S. 2d 901 (1st Dept. 1967).

And the facts of the instant case show this to be the case. The complaint in the state court stated a number of well-pleaded causes of action for fraud (47a-58a), and the affidavit in support of attachment contained specific reasons for the attachment based on information and belief together with the basis of the affiant's statements (44a-45a). Indeed, the affidavit was characterized by the opinion below as "extensive and detailed" (J.S. 2a).* Attachments

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* This was hardly the case in *Mitchell* v. *W.T. Grant, supra,* 416 U.S. 600 at 605, 616, where La. C.C.P. 3501 provides for an

(*footnote continued on following page*)

under New York law are not granted on perfunctory allegations.

And, when the motion to vacate is made, while the courts on the motion to vacate do not actually try the merits of the case, they do delve into plaintiff's showing of entitlement. To quote *Boston Old Colony Ins. Co.* v. *Bianchi*, N.Y.L.J., February 26, 1975, p. 16, c. 1 (Sup. Ct. N.Y. Co. *Helman* J.):*

> "On the present application [under 6223] elaborate affidavits and exhibits have been submitted on both sides bearing on the factual and legal issues involved, so as to provide movant with a full and fair hearing. While conflicts exist, there can be little doubt that the plaintiff's supporting affidavits establish prima facie, a showing of fraud and conversion, sufficient to charge defendant with responsibility and culpability in the activities complained of by plaintiff."

In light of the fact that the plaintiff has sustained a significant burden of proof in initially obtaining the order, on a motion to vacate it is not at all unreasonable that the defendants have a burden of "going forward", to dispute the basis of the attachment by showing that it was unauthorized. This may be called a "burden of proof" (J.S.

(*footnote continued from preceding page*)

affidavit showing "the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specifications . . ." However, as stated in the dissent of Justice Stewart, 416 U.S. at 632, "(t)he Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court". And at 633—". . . issuance of the summary writ becomes a simple ministerial act" and footnote 4 thereto.

It also was not the case in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, —— U.S. ——, 42 L. Ed. 2d 751, 756, n. 2.

* This is another state court decision rendered since *Sugar* that has declined to follow it.

9a), but is seen as really the burden of going forward. The plaintiff must always in the end justify his right to attachment as the cited cases establish.

Apart from that, the reliance below upon the burden of proof on vacatur has not the crucial significance as to the constitutionality of granting *ex parte* attachments* accorded to it on the disposition by the District Court. When attachments are granted as a matter of course on routine affidavits, some significance may be placed upon the burden of proof at a vacatur hearing. This was the case in *Mitchell*,** and *Di-Chem*. But given the significant initial and ultimate burden of the plaintiff in New York (to persuade the judge to exercise his discretion and grant attachment) the fact that the burden of going forward shifts during the proceeding is clearly not of constitutional significance. *United States* v. *Illinois Central R.R. Co.*, 291 U.S. 457, 463-464 (1934).

Flexibility in deciding what due process requires is the keynote of *Mitchell*. The decision below treated *Mitchell* as

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* As was said by Joseph M. McLaughlin, *New York State Trial Practice*, New York Law Journal, November 8, 1974, p. 1, at p. 4, c. 1 (Mr. McLaughlin is Dean of the Fordham Law School in New York and the author of the Practice Commentary to the CPLR Art. 62):

> "Properly analyzed the only substantive difference between the statute sustained in *Mitchell* and the CPLR provision lies in the burden of proof. Whereas in *Mitchell*, the burden that the seizure was authorized rested upon the attaching creditor, under New York law the burden rests upon the defendant debtor to show that the attachment is unauthorized. The ultimate question, therefore, is whether this difference in burden of proof is of constitutional proportions. This writer remains unpersuaded that it is." (Footnote omitted.)

** It must be recognized that in *Mitchell* in every county, save the one where the writ of sequestration was issued, the court clerk was the issuing agent. It cannot be presumed the state judge in *Mitchell* applied higher standards than the court clerk in other counties, when granting the sequestration.

setting inflexible standards without any consideration of the highly discretionary nature of attachment in New York and the practical difficulty of obtaining such a "drastic remedy", *Macmillan, Inc.* v. *Hafner* (*Mitchell,* 416 U.S. at 610), *supra.* Considered "as a whole", the New York procedure has made a constitutional accommodation of the respective interests of the parties to the litigation. On issues of interpreting state law and procedures, the state courts, of course, are the ultimate authority. *O'Brien* v. *Skinner,* 414 U.S. 524, 531 (1974) and the District Court should have considered itself bound by the law as set out in relevant New York cases. The error below principally was occasioned by misapplication of the state law.

POINT II

The remedy of attachment is not confined only to creditors holding pre-existing interest in the property subjected to same. There is no basis for any constitutional limitation of the provisional remedy of attachment to those such pre-existing interests.

While a vendor's lien, or claim of ownership of property, may not be in the *sine qua non* of attachment in New York, it is a fanciful notion to claim that thereby there is a violation of due process. In *Mitchell* (416 U.S. at 628) (POWELL, J., concurring), this Court did not find in *Fuentes* (407 U.S. 67), a "Procrustean rule of a prior adversary hearing" before seizure of property. But it did not intend to establish a vendor's lien as a Procrustean condition of attachment. While the existence of a vendor's lien may be easy to establish (*Mitchell* at 609), the interests of debtors and creditors can and must be considered in other situations. The very fact that New York in Section 6201(4), (5) and (8) the grounds for attachment are more difficult to prove than Louisiana's in *Mitchell*

furnish no basis for condemning the New York statute for being more protective of debtors.

In any event, it is necessary to apply a balancing test. The Court's opinion in *Mitchell* recognized that the state's interest in establishing pre-judgment attachment are two-fold. The first is to conserve property which is the subject of dispute from waste or alienation by a debtor which protects the creditor's interests in the property. This preserves credit and enhances the flow of commerce. The second is to avert self-help measures by a creditor, which may be accompanied by violence and retaliation. *Id.* at 605. These themes are considerations in New York's statute making attachment available in specified instances. CPLR 6201 (1) through (8). This is especially so in the instant attachment involving a commercial transaction.

The element of a fraud cause of action found in attachments granted under Section 6201(5) and (8) are easy to determine and do consist of specific elements, all of which are necessary to state a valid cause of action. 24 N.Y. Jur. *Fraud and Deceit*, § 14 (representation of a material existing or pre-existing fact, falsity, scienter, deception and injury). If any of the elements are lacking, there is no sufficient complaint. Such a preliminary determination is properly a judicial function, with the judge exercising his discretion.

While Sections 6201(5) and 6201(8), the two bases for issuance of the state attachment, were not seen in the conveniency opinion below as following *Mitchell* as closely as Section 6201(4), it "presumably embodies the inference that fraudulent activity by a defendant giving rise to a lawsuit may indicate the defendants' willingness to commit fraud to avoid payment of a judgment resulting from the lawsuit" (J.S. 28a). This is echoed in 1973 Practice Commentary (McLaughlin 1973) to CPLR 6211 (7B McKinney's [6001-7700] Pocket Part, pp. 27-28):

> "CPLR 6201(8) authorizes an attachment in an

action to recover for conversion of fraud. If the defendant has committed the act charged in the complaint, one can readily predict what his action will be when he notified that the plaintiff is going to seek an order of attachment. Query: If there is a reasonable fear that the defendant will hide his assets to protect them from attachment, is this not a sufficient reason to permit the plaintiff to proceed ex parte?"

Contrary to the absence of judicial scrutiny found to be a constitutional vice in *Di-Chem,* as a preliminary matter in authorizing the attachment, it is necessary for a judge in his judicial capacity to make a determination of the complaint's sufficiency. The granting of an attachment is not a determination of the ultimate merits of the case. By not making the vendor's lien the basic criterion of attachment, New York is more protective of the debtor than Louisiana. In the latter, Louisiana C.C.P. Art. 3571 allows sequestration on a simple claim of ownership, or a mortgage, lien or privilege thereon, "if it is within the power of the defendant to conceal, dispose of, or waste the property of revenues . . ." Note there is no issue as to actual *intent* of the defendant. *Cf.* CPLR 6201(4) which requires 'intent' to defraud", not just the ability or power. And Section 6201(5) requires a contract, which in the instant case was express and part of the application for the attachment (55a-56a).

The grounds on which attachment shall be available is still a matter for the State legislature. As was said in *Rothschild* v. *Knight,* 184 U.S. 334, 341 (1902), that "(t)o what actions the remedy of attachment may be given is for the legislature of a state to determine and its courts to decide . . .".

It was not the lack of a vendor's lien or its general availability which led the Court to strike down Georgia's attachment statute in *Di-Chem, supra.* Indeed, the

vendor's lien was not even mentioned. See *Hutchinson* v. *Bank of North Carolina*, —— F.Supp. ——, 43 L.W. 2441, 2442 (c. 2) (4-29-75), pointing out that *Mitchell* is not confined to statutes that afford a prejudgment remedy only to creditors holding a pre-existing interest in the property subjected to the writ.

A statute such as New York's undisputably contains most and, on analysis, all of the safeguards referred to in *Di-Chem*. *Di-Chem*, *id.* at 757, is not lacking in due process simply because of lack of a vendor's lien. The Court's opinion therein lays stress on *Mitchell's* (Louisiana's) writ of attachment sequestration being issuable only by a *judge* upon a sufficient affidavit.

It is apparent that the District Court placed an indefensible stress on the absence of a pre-existing possessory lien. With such a misconception, it ignored basic guidelines in determining due process. As said in *Mitchell*, *supra*, at 610 and left undisturbed by *Di-Chem*:

> "The requirements of due process of law 'are not technical, nor is any particular form of procedure necessary'. *Inland Empire Council* v. *Millis*, 325 U.S. 697, 710 (1945). Due process of law guarantees no particular form of procedure; it protects substantial rights. *NLRB* v. *Mackay Co.*, 304 U.S. 333, 351 (1938). The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961); *Stanley* v. *Illinois*, 405 U.S. 645, 650 (1972)".

CONCLUSION

The judgment below should be reversed.

Dated: New York, New York
May 27, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants Carey, Fine, Beisheim and pro se and also pursuant to New York Executive Law § 71

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

Appendix A.

Text of sections of statute involved, New New Civil Practice Law and Rules.

§ 6201. Ground for attachment.

An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a foreign corporation or not a resident or domiciliary of the state; or

2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or

3. the defendant, with intent to defraud his creditors or to avoid the service of summons, has departed or is about to depart from the state, or keeps himself concealed therein; or

4. *the defendant, with intent to defraud his creditors, has assigned, disposed of or secreted property, or removed it from the state or is about to do any of these acts;* or

5. *the defendant, in an action upon a contract, express or implied, has been guilty of a fraud in contracting or incurring the liability;* or

6. the action is based upon the wrongful receipt, conversion or retention, or the aiding or abetting thereof, of any property held or owned by any governmental agency, including a municipal or public corporation, or officer thereof; or

7. the cause of action is based on a judgment, decree or order of a court of the United States or of any

other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53; or

8. *there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit.* (emphasis supplied on subsections invalidated from court judgment).

§ 6211. Order of attachment.

An order of attachment may be granted without notice, before or after service of summons and at any time prior to judgment. It shall specify the amount of the plaintiff's demand, be indorsed with the name and address of the plaintiff's attorney and shall be directed to the sheriff of any county or of the city of New York where any property in which the defendant has an interest is located or where a garnishee may be served. The order shall direct the sheriff to levy within his jurisdiction, at any time before final judgment, upon such property in which the defendant has an interest and upon such debts owing to the defendant as will satisfy the plaintiff's demand together with probable interest, cost, and sheriff's fees and expenses.

Rule 6212. Motion papers; undertaking; filing; demand.

(a) Affidavit; other papers. On motion for an order of attachment the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action and the one or more grounds for attachment provided in section 6203* that exist and the amount demanded from the defendant above all counterclaims known to the plaintiff.

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* So in the original. Probably should read "6201". (See 7B McKinney's, CPLR 6001 to 7700, p. 58, after text of R. 6212.)

(b) Undertaking. On a motion for an order of attachment the plaintiff shall give an undertaking, in a total amount fixed by the court, but not less than two hundred fifty dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees.

(c) Filing. Within ten days after the granting of an order of attachment, the plaintiff shall file it and the affidavit and other papers upon which it was based and the summons and complaint in the action. Unless the time for filing has been extended, the order shall be invalid if not so filed, except that a person upon whom it is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity.

(d) Demand for papers. At any time after property has been levied upon, the defendant may serve upon the plaintiff a written demand that the papers upon which the order of attachment was granted and the levy made be served upon him. Not more than one day after service of the demand, the plaintiff shall cause the papers demanded to be served at the address specified in the demand. A demand under this subdivision shall not of itself constitute an appearance in that action.

§ 6222. Discharge of attachment.

A defendant whose property or debt has been levied upon may move, upon notice to the plaintiff and the

sheriff, for an order discharging the attachment as to all or a part of the property or debt upon payment of the sheriff's fees and expenses. On such a motion, the defendant shall give an undertaking, in an amount equal to the value of the property or debt sought to be discharged, that the defendant will pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding the amount of the undertaking. Making a motion or giving an undertaking under this section shall not of itself constitute an appearance in the action.

§ 6223. Vacating or modifying attachment.

Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court shall give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

Appendix B—Regnell v. Page.

New York Law Journal, May 23, 1975, p. 14, c. 2
SUPREME COURT,
NEW YORK COUNTY.

SPEC. TERM, PART I.

Justice Fein

REGNELL v. PAGE—Motion by defendants to reargue that portion of their prior motion which sought vacatur of the order of attachment in this action, which was denied by order dated June 27, 1974, is deemed a motion for renewal and is granted. Upon reconsideration, the court adheres to its original determination sustaining the order of attachment.

Plaintiffs, as trustees of welfare and pension funds, sue to recover for the fraud of defendants in breach of collective bargaining and trust agreements, which required defendants to make payments or contributions to such funds to provide benefits to employees based upon the number of employee hours worked. Periodic reports were to be submitted detailing employee hours and the amount due. Payments were to be made to the funds pursuant to the reports, subject to a later audit. Plaintiffs allege the deliberate submission of false reports, causing the funds to become substantially underpaid, as disclosed by an audit which revealed the existence of a double set of bookkeeping records at least as to one of the companies.

The prior decision (New York Law Journal, July 9, 1974, p. 11, c. 7), declined to hold CPLR article 62, the attachment article, unconstitutional to the extent that it permits attachment without prior notice in an action to recover a money judgment on the grounds of fraud and deceit. In reliance upon Mitchell v. W. T. Grant Company (416 U. S. 600), it was held that the New York attachment

statute affords sufficient safeguards in that it permits an immediate test of the validity of the attachment by motion to vacate, constituting an adversary hearing where the facts are challenged or are in dispute.

The decision noted the important governmental and general public interest in honestly financing and properly maintaining employee welfare and pension trust funds, designed for the protection of employees and as a form of deferred compensation. An employer's failure to make employee welfare and pension contributions is made criminal (N. Y. Labor Law, sec. 198[c]), and personal liability is imposed on the ten largest shareholders of corporations which fail to make such contributions (N. Y. Business Corporation Law, sec. 630). There also exists a certain priority in insolvency proceedings for claims involving welfare and pension contributions (N. Y. Debtor and Creditor Law, sec. 22).

Defendants' motion for reargument is premised upon the authority of Sugar v. Curtis Circulation Company (383 F. Supp. 643), decided almost four months after the prior decision. That case held that the New York attachment statute, in particular, CPLR sec. 6201(4)(5) and (8), and CPLR sec. 6211, was unconstitutional to the extent that the challenged provisions collectively permit attachment merely upon plaintiff's ex parte allegation that defendant had defrauded him. The court stated, at 383 F. Supp. p. 650, "a New York defendant has no meaningful opportunity to vacate an order of attachment granted ex parte and without prior notice."

With all due respect to the Sugar court, this court adheres to the prior determination that upon the facts and circumstances of this case, the New York attachment statute meets the requisites of procedural due process laid down in Mitchell. The decision of the Sugar court, albeit a three-judge federal court, is not controlling, although it is entitled to serious consideration (8 N. Y. Jur., Constitutional Law sec. 45; 147 A.L.R. 857; Zurich Gen.

A. & L. Ins. Co., Ltd. v. Lackawanna S. Co., 164 Misc. 498; aff'd 254 App. Div. 839, revd. 279 N. Y. 495, revd. 307 U. S. 265, reh. den. 307 U. S. 650 and 308 U. S. 631).

State court decisions subsequently rendered have upheld the constitutionality of the attachment statute, despite the Sugar decision. (Marshall, Bratter, Greene, Allison & Tucker v. Knight, N. Y. L. J., Dec. 20, 1974, p. 2, c. 3; Salerno v. Salerno, N.Y.L.J. Jan. 24, 1975, p. 18, c. 2; Boston Old Colony Ins. Co. v. Bianchi, N. Y. L. J., Feb. 26, 1975, p. 16, c. 1; New York Auction Co. v. Belt, N. Y. L. J., April 9, 1975, p. 17, c. 3; also see McLaughlin, New York Trial Practice, N. Y. L. J., Nov. 8, 1974, p. 1, cols. 1 and 2).

The federal court has stayed its decision in Sugar pending an appeal to the Supreme Court of the United States. Upon review, it appears that the principles stated in Mitchell do not warrant the extremely broad Sugar holding. The New York attachment statute, in its protective features, appears closer in form and substance to the statute upheld in Mitchell than to those declared invalid in (Fuentes v. Shevin, 407 U. S. 67). "[T]he narrow door of constitutionality left open in Mitchell", to adopt the phrase employed by the district court in Sugar, is sufficiently ajar to permit the New York statute to "squeeze through" as comfortably as did the Louisiana statute upheld in Mitchell.

Fuentes held unconstitutional Florida and Pennsylvania replevin statutes which permitted a secured installment seller to repossess goods which had been sold, without notice or hearing and without judicial order or supervision, upon a mere writ of replevin issued by the court clerk. There was no requirement of a convincing showing before seizure. All that was necessary was the bare asssertion on entitlement by the party seeking the writ. There was no opportunity for an immediate hearing until trial of the court action for repossession. The court held the seizure violative of due process standards, since it was carried

out without notice or opportunity for hearing and without judicial supervision.

Although, in sustaining the Louisiana sequestration statute, Mitchell departed from some of the broad pronouncements in Fuentes, the Mitchell court carefully noted that the Louisiana statute was substantially different from the Florida and Pennsylvania provisions invalidated in Fuentes: (1) the sequestration order could be issued only where the grounds relied upon clearly appeared from the affidavit or petition submitted in support of the writ; (2) judicial approval of the writ of attachment was required; (3) there was judicial control of the process from beginning to end; (4) the attaching creditor was obligated to post a bond; (5) the debtor (defendant) had the right to regain possession of the property or extinguish the attachment, by posting a bond; (6) the statute entitled defendant (debtor) to seek dissolution of the writ immediately to be granted unless the "creditor proves the grounds upon which the writ issued", and "failing which the court may order return of the property and assess damages in favor of the debtor, including attorneys fees."

The three judge court in Sugar, observing that the New York attachment statute is strikingly similar to the Louisiana sequestration statute in all respects but one, invalidate the New York statute on the ground that it does not guarantee defendant an opportunity for an immediate post-seizure hearing, at which the plaintiff must prove the grounds upon which the writ was issued. The court asserted that the sole basis for vacating an attachment under the CPLR is that the attachment is unnecessary to the security of the plaintiff. Such an interpretation, however, misconstrues the statute. A motion to vacate under CPLR 6223 on the ground that the attachment is unnecessary to the security of the plaintiff is but one of several available bases. Vacatur may be premised on the grounds, among others, that the attachment is unauthorized in the action, or that the ground for attachment relied upon

is insufficient. There does exist an opportunity for an immediate post-sezure hearing. Defendant, at any time before application of the property or debt attached to the satisfaction of a judgment, may move, on notice, for an order vacating or modifying the order of attachment. As observed in this court's original decision, where the facts are challenged upon such a motion, an appropriate hearing may be ordered.

Thus viewed, the only difference between the Louisiana and New York statutes is that the New York statute, unlike Louisiana, does not state that upon a motion by defendant to dissolve the writ, the attachment is to be vacated unless plaintiff proves the grounds upon which the writ was issued. Sugar, citing New York authorities holding that defendant has the burden of proof upon such a motion concludes that this difference between New York and Louisiana is of constitutional significance. That due process is necessarily violated by imposing the burden of proof on a defendant is not nearly as clear as Sugar suggests (Leland v. Oregon, 343 U. S. 790; U. S. v. Ill. Central RR., 291 U. S. 457).

Moreover, the New York authorities are not so definitive as Sugar posits as to the burden of proof, except as to non-resident corporate defendants with only transitory assets in New York, as was the case in the most recent New York decisions cited in Sugar (Hydromar Corp. of Delaware v. Construction Aggregates Corp., 32 A. D. 2d 749; George A. Fuller Co. v. Vitro Corp. of America, 26 A. D. 2d 916).

Thus, in Stines v. Hertz Corp., 22 A. D. 2d 823, aff'd 16 N. Y. 2d 605, the court, in vacating an attachment, otherwise grounded, stated, at 22 A. D. 2d, p. 823:

"While the court is not required to decide the merits of a controversy on a motion to vacate an attachment 'the attachment papers must contain evidence from which the court can determine that the ultimate facts alleged in the complaint can be substantiated (Krellberg v. Gregory, 10

A. D. 2d 824). Where the complaint and affidavits fail to establish a prima facie cause of action, or where they clearly establish that 'the plaintiff must ultimately be defeated', the attachment must be vacated (American Reserve Ins. Co. v. China Ins. Co., 297 N. Y. 322, 325)."

And, in a case more clearly like ours, where the issue is one of fraud and disposition and secretion of assets, and no question of jurisdiction is involved, it has recently been ruled, in vacating an attachment, in Macmillan, Inc. v. Hafner, 42 A. D. 2d 533:

"At best, respondent presented but a scintilla of proof as to the requisite elements of the fraud cause of action alleged in the complaint. Such a perfunctory showing falls far short of the requirements to support the drastic remedy of attachment."

Even assuming that the prevailing case law imposes the burden on the defendant, such rule is neither implicit in nor directed by the New York statute and therefore should not affect its constitutionality. This is patent from this very case, where the issue is immaterial, since defendants do not challenge the facts as asserted.

As observed in the original decision, the papers in support of the attachment indicate a concession by defendants that the reports were false and that underpayments were made. A hearing under such circumstances would have no valid purpose.

In addition, it is significant that here, as in Mitchell, both parties assert a real interest to be protected, which, under the principles of Mitchell, requires an accommodation or balancing of interests in the application of due process requirements, rather than the inflexible approach taken by the three judge federal court in Sugar. As the Supreme Court observed in Mitchell:

"To summarize, the Louisiana system seeks to minimize the risk of error of a wrongful interim possession by the creditor. The system protects the debtor's interest in every conceivable way, except allowing him to have the

property to start with, and this is done in pursuit of what we deem an acceptable arrangement pendente lite to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits" (Mitchell v. W. T. Grant Company, supra, 416 U. S. at p. 618).

In fixing and applying due process standards, there is a need for flexibility in balancing the interests of plaintiff and defendant, as recently stated in another context in Matter of Sanford v. Rockefeller (35 N. Y. 2d 557, at p. 563):

"The flexibility in approach to the balance to be struck in such cases can be seen in decisions of this court where we have measured the degree of essential due process to confirm to the petitioner's situation."

Here, plaintiff has an interest in the payments due the trust funds on behalf of defendants' employees, who also have an interest to be protected. The defendants oviously have an interest in the property attached. Moreover, as noted, there is manifestly an important governmental and general public interest in honestly financing and properly maintaining employee welfare and pension trust funds. Considering the New York procedure as a whole, it appears that, in accordance with the principles set forth in Mitchell in sustaining the Louisiana Statute, "the State has reached a constitutional accommodation of the respective interests" of all parties (Mitchell v. W. T. Grant Company, 416 U. S. at p. 610).

Of further significance is the fact that, although the attachment was based upon allegations of fraudulent conduct, there is also some evidence that defendants were about to leave the jurisdiction and that some of defendants' property had already been sold and converted into cash. The properties attached are apparently of businesses which are no longer operating and the attachment actually amounts to no more than a lien against defendants' real estate and possible accounts receivable. Nor has

the defendants' use and possession of the real property been interfered with. The only practical effect of the attachment is to prevent disposal of conveyance to a third party. As observed initially, these are not the kind of important interests required by the Supreme Court to be held immune from attachment prior to a hearing on notice.

Defendants are not aided by recent post-Sugar changes in the rules of the Civil Court of the City of New York (Notice, Thompson, J., N.Y.L.J., 10/3/74, p. 1, cols. 6 and 7) directing that all orders of attachment provide that plaintiff, within three days after levy, shall move on notice to the defendant, the garnishee and the sheriff, for leave to prove the grounds upon which the order of attachment was issued. The burden of proof on such a motion is on the plaintiff, and the attachment will be deemed vacated if such a motion is not made.

In the original decision on the motion, almost four months prior to the federal opinion in Sugar, it was suggested.

"Although CPLR article 62 does not now so provide, it may very well be appropriate, in the interests of due process, for the court to follow the practice used where an interim stay is granted in an order to show cause. The attachment order could incorporate a provision staying transfer of the property attached until an almsot forthwith return day fixed in the order, thus affording an immediate opportunity to be heard." (N.Y.L.J., 7-9-74, p. 11, c. 8).

Whatever the wisdom of such provisions which upon plaintiff both the burden of applying to the court for relief, and the additional burden of proof therein, the central issue here is the constitutional significance and effect of the failure of our Legislature to incorporate such a provision in the statutory scheme. It must be held that the absence of such provision is not of constitutional import under the facts and circumstances of this case. Plaintiffs have affirmatively estalished a valid basis, without contra-

diction by the defendants, to uphold the ex parte issuance of the order of attachment. The possession of the property by defendants is not affected. As the facts asserted and upon which the attachment order wa issued are not in dispute, there is no need for a formal hearing.

Serve a copy of this order with notice of entry without undue delay.

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IN THE

Supreme Court of the United States

October Term, 1974

Docket No. 74-758

PROVIDENT SECURITIES COMPANY,
a California Corporation,

Cross-Petitioner,

against

FOREMOST McKESSON, INC.,
a Maryland Corporation,

Cross-Respondent.

ANSWERING BRIEF OF CROSS-RESPONDENT

MORTON MOSKIN
Attorney for Cross-Respondent
Foremost-McKesson, Inc.
14 Wall Street
New York, New York 10005
(212) 732-1040

THOMAS McGANNEY
WHITE & CASE

PHILIP E. DIAMOND
LANDELS, RIPLEY & DIAMOND
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ANSWERING BRIEF OF CROSS-RESPONDENT

Cross-Petitioner's Conditional Cross-Petition should not be granted. Cross-Petitioner itself explains why, when at page 10 of its Cross-Petition it concedes that "the questions presented might not be sufficiently important to justify an independent petition for a writ of certiorari." Moreover, the principal points raised by the Cross-Petition were dealt with correctly by the Ninth Circuit.

Cross-Petitioner's Statement of the Case (pp. 4-5) does however confirm the essential facts (as distinguished from Cross-Petitioner's argumentative characterization of them)

upon which Foremost's Petition (No. 74-742) is based. The undisputed facts set forth in the Cross-Petition in fact go counter to the arguments made by Cross-Petitioner. A few examples from the Cross-Petition follow:

(1) Underlying Questions 1 and 2 is Cross-Petitioner's continuing but erroneous stance that it did not of its own free will enter into an agreement to exchange certain of its assets for securities of Foremost-McKesson, Inc. As Question 1 is phrased:

> "* * * the recipient of the securities wished only to receive cash for its assets." (P. 3)

Question 2 puts it that securities were received:

> "* * * solely as an accommodation to the purchaser." (P. 3)

The refrain is repeated at page 11 where it is said that "Provident's sole motivation was to dispose of its assets in exchange for cash * * *" Yet the absence of any duress or coercion and the fully volitional nature of the agreement to exchange assets for securities is laid bare at pages 5 and 6 where it is admitted that "After investigation of various proposals, Provident decided to pursue negotiations * * *", and "Extensive negotiations followed between Provident and Foremost regarding the form of the transaction and the nature of the consideration to be paid. * * * Compromise eventually was reached under which Foremost agreed to take such steps as were necessary to accommodate the sale * * * of one-half of the securities to be transferred to Provident."

(2) As question 3 would have it, there should be read out of the law the statutory definition that a contract to

sell is a "sale". But at page 15 Cross-Petitioner appears to concede that the underwriting agreement was indeed a "firm commitment", and thus in truth a binding contract and thus a "sale". The summary of *Champion Home Builders Co.* v. *Jeffress*, 490 F. 2d 611 (6th Cir. 1974), *cert. denied*, 42 U.S.L.W. 3631 (May 14, 1974), upon which Cross-Petitioner relies (p. 15), is highly imprecise. The *Jeffress* court found that the statutory purchase occurred on the date the contract there in issue was executed, rather than on the date the corporate board adopted a resolution which the court characterized as "nothing more than an authorization to negotiate * * * no more than a license to bargain." 490 F. 2d at 617. It is the date of execution of the underwriting agreement that we submit, and the Ninth Circuit found, should be determinative here.

Page 8 discloses that Cross-Petitioner is at least consistent in its determination to ignore the statute's mandate that contracts to sell or purchase, as the case may be, do constitute sales or purchases. This time in the context of the agreement to exchange assets for convertible debentures it is suggested that "Prior to *receipt* of the debentures, Provident had no legal or beneficial ownership in any security of Foremost." (Emphasis added.)

Cross-Petitioner's formulations should be contrasted with the statutory definitions (Securities Exchange Act of 1934, §§3a(13), 3a(14) (15 U.S.C. §78(c)(13), (14); 48 Stat. 882, 884)):

> "(a) When used in this chapter, unless the context otherwise requires—
>
> * * *
>
> (13) The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire.

> (14) The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

(3) Question 4 is bottomed on the unsupportable premise that the mere adoption by a corporation of a revocable plan of liquidation* converts the corporate owner of securities into a mere custodian or perhaps into some wholly passive kind of a trustee—presumably without reference to how long the condition persists.

As appears from page 9, "liquidation proceedings continued throughout late 1969 and 1970" and not until August 31, 1970 was Provident "declared dissolved by court order and its remaining assets * * * transferred to a liquidating trust." The concept is restated at page 16 in these words: "Provident's shareholders, not Provident, were in fact and in law the beneficial owners of these debentures." Not the least of the factual deficiencies in this novel theory is sharply illuminated at pp. 7-8 where Cross-Petitioner admits that its shareholders could not have received the Foremost-McKesson securities and resold them through underwriters because

> "it was impossible to get consents to sell from the minor shareholders without the appointment of guardians; in addition, one shareholder was somewhere in the Brazilian jungles and could not be contacted (R., pp. 397-398). To resolve this problem, Foremost agreed to a change in the Purchase Agreement so that Provident, instead of its shareholders, might sell the debentures."

---

* Cross-Petitioner does not, in its citation of the applicable state law, refer to Cal.Corp.Code §4606 which provides that a plan of liquidation can be revoked by a majority vote of the shareholders prior to distribution and §4618 which provides that the state court may, under certain circumstances, revoke an election to wind up and dissolve. (See Appendix A)

In so doing, Provident was hardly passive and was no more "acting solely for the benefit of its shareholders" (p 16) than every corporation is charged with doing in the ordinary course of its business.

(4) On page 10, in struggling to construct an argument that this was somehow an "unorthodox" transaction entitled to be measured by the pragmatic possibility of abuse test rather than the automatic presumption of abuse of inside information traditional standard, Cross-Petitioner posits that "in effect, Provident was merged into Foremost and it received cash and Foremost debentures as consideration in that merger." Although it is fundamental that in a merger the surviving corporation, by operation of statute law, succeeds to *all* of the disappearing corporation's assets and liabilities, Cross-Petitioner at page 6 recites that "The purchase agreement provided that Foremost would purchase approximately two-thirds of Provident's assets. . . ." In addition, the contract left all of Cross-Petitioner's tax liabilities and accrued pension and retirement plan liabilities with it. (R. 467) As to the disappearance of the subordinate "merger" partner, the Court is again referred to page 9 where the vanishing corporation is said not to have departed the scene until ten and one-half months later, when its dissolution was finally recognized by an August 31, 1970 court order.

The whole argument comes down to the assertion that Provident's payment of consideration other than cash for the stock somehow made the transaction "unorthodox": "if there is no cash involved, then there may not have been any wish to acquire the stock and, accordingly, no

intent to speculate." (P. 11) Why this might be so is not further explained, presumably because it is in the nature of all non sequiturs that they defy logical explanation. In any event, the operation of Rule 16(b) cannot swing on such fanciful distinctions between cash and other consideration; as this Court has said "'* * * Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period' * * *" *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U.S. 418, 422 (1972).

(5) Point II of the Cross-Petition is devoted to the argument that, assuming that the transaction was unorthodox, "the transaction involved no potential for actual speculative abuse." Cross-Petitioner purports to make this point by resort to the claim that "the presumption of access to inside information * * * can * * * be rebutted by other facts" (Page 12). Cross-Petitioner then proceeds to offer as support one "undisputed" alleged "fact"—*i.e.*, "there was no reason for Provident to have, and it did not have, any access to Foremost's books and records" (p. 13). No basis in the record is offered or can be found for this so-called "fact". Despite this, Cross-Petitioner would have the determination made—in the setting of what page 4 correctly describes as a motion for summary judgment—that it had no possible access to inside information.

Conclusion

The issues raised by Provident's Cross-Petition are not significantly important to warrant the attention of this Court. The only issue in this case worthy of the Court's

attention is the question presented in Foremost's Petition (Docket No. 74-742), a question fundamental in the interpretation of Section 16(b) which the Ninth Circuit has decided differently than every other Circuit Court which has considered the issue.

Respectfully submitted,

MORTON MOSKIN
Attorney for Cross-Respondent
Foremost-McKesson, Inc.

THOMAS MCGANNEY
WHITE & CASE

PHILIP E. DIAMOND
LANDELS, RIPLEY & DIAMOND
Of Counsel

January 15, 1975

Appendix A

California Corporations Code

§4606. Verification of authorization to wind up affairs: Certificate: Subscription, verification and filing: Contents. A voluntary election to wind up and dissolve may be revoked prior to distribution of any assets by the vote or written consent of shareholders or members representing no less than a majority of the voting power, or by resolution of the board of directors if the election was by the directors pursuant to Section 4601. Thereupon a certificate evidencing the revocation shall be subscribed, verified and filed in the manner prescribed by Section 4603.

The certificate shall set forth:

(a) That the corporation has revoked its election to wind up and dissolve.

(b) That no assets have been distributed pursuant to the election.

(c) If the revocation was made by the vote or written consent of shareholders or members, the number of shares or memberships voting for or consenting to the revocation and the total number of outstanding shares or memberships the holders of which were entitled to vote on or consent to the revocation.

(d) If the election and revocation was by resolution of the board of directors it shall be so stated.

* * *

§4618. Same: Revocation of election to wind up. The jurisdiction of the court includes the revocation of the election to wind up and dissolve by the shareholders, and the making of orders for the withdrawal and termination of proceedings to wind up and dissolve, subject to conditions for the protection of shareholders and creditors.